INDEX

Subject Index

	Page
Petition for rehearing on denial of petition for certiorari to the United States Circuit Court of Appeals for the Fifth Circuit	1
Certificate of counsel	3
Brief in support	4
Relative to the Court's admitted erroneous refusal to charge, at the time requested (timely exception being reserved and allowed), that the failure of the defendant to take the stand would not give rise to any presumption against him, and also that such fact should not enter into the discussions or deliberations of the jury in any manner	4
Relative to the erroneous instructions by the Trial Court of law relating to presumption of innocence, and reasonable doubt	7
Relative to the finding that petitioner was a member of the general conspiracy as laid in the indictment	8

List of Authorities Cited

Table of Cases

Berger v. *U. S.*, 295 U. S. 78	10
Brasfield v. *U. S.*, 272 U. S. 448, 450	8
Bruno v. *U. S.*, 300 U. S. 287	2, 4
Coffin v. *U. S.*, 156 U. S. 432, 458-462	7
Ezzard v. *U. S.* (8 Cir.), 7 F. (2d) 808, 811	7
Gomila v. *U. S.* (5 Cir.), 146 F. (2d) 372	7, 8
Kopald-Quinn Co. v. *U. S.*, 101 F. (2d) 635	10
Kotteakos v. *U. S.*, decided June 10, 1946, Nos. 457 and 458	2
Marcante v. *U. S.* (10 Cir.), 49 F. (2d) 156, 157	11
McAdams v. *U. S.* (8 Cir.), 74 F. (2d) 37, 40	7
U. S. v. *Atkinson*, 297 U. S. 157, 160	8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 485

NATHAN SILVERMAN,

Petitioner,

versus

UNITED STATES OF AMERICA

PETITION FOR REHEARING ON DENIAL OF PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of NATHAN SILVERMAN, for a rehearing is based on the following grounds:

1. This Court erred in upholding the Circuit Court's opinion that the failure to give the charge at the time it was requested to the effect that petitioner's failure to take the stand would not give rise to any presumption against him, and also that such fact should not enter into the discussions or deliberations of the jury in any manner, was

mere technical error. This, we contend, is in direct conflict with the holding of this Court in *Bruno* v. *U. S.*, 308 U. S. 287; c/f *Kotteakos* v. *U. S.*, decided June 10, 1946, Nos. 457 and 458, holding that the error would not be treated as harmless where the failure to charge "was a departure from a constitutional norm *or a specific command of Congress.*"

2. The Court erred in upholding the Circuit Court's finding that the serious errors in the charges relative to the presumption of innocence and reasonable doubt did not do substantial injury to this defendant, in view of the doubt expressed that this petitioner was member of general conspiracy.

3. The Court erred in upholding the Circuit Court's finding that even though this defendant was not a member of "the general conspiracy" his close connection with the other defendants would impute to him all of the acts of the others, and warrant his being placed in a mass trial.

4. Petitioner in order not to burden this petition by repetition, adopts, by reference, the causes for rehearing claimed in the companion petitions in Nos. 484 and 486 insofar as applicable.

WHEREFORE, this petitioner, tending herewith his brief in support of this petition, prays that a rehearing be granted to him.

WARREN O. COLEMAN,
Counsel for Petitioner,
408 Whitney Building,
New Orleans 12, Louisiana.

Certificate of Counsel

I hereby certify (original signed) that the above and foregoing petition for rehearing is filed in good faith, upon real and substantial grounds, and not for mere purpose of delay.

WARREN O. COLEMAN,
Counsel for Petitioner.

BRIEF IN SUPPORT

MAY IT PLEASE THE COURT:

I

Relative to the Court's admitted erroneous Refusal to Charge, at the time requested (timely exception being reserved and allowed), that the failure of the defendant to take the stand would not give rise to any presumption against him, and also that such fact should not enter into the discussions or deliberations of the jury in any manner.

This Court held in *Bruno* v. *U. S.*, 308 U. S. 287, that a defendant who elected not to give testimony in his own defense was entitled, *as a matter of statutory right*, to request an instruction to the effect that: (1) his failure to testify would not give rise to any presumption against him, and (2) *that this fact should not enter into the discussions or deliberations of the jury in any manner.* This Court, after discussing the harmless error statute (Sec. 269), reversed the judgment in the *Bruno* case because this charge was refused. This Court found that to deprive the accused of a right granted by a specific command of Congress was reversible error, stating, "Is the disregard of the right which Congress gave to Bruno error, the commission of which we may disregard? We hold not * * *." To the argument that the matter was merely a technical error this Court said: "Of a very different order of importance is the right of an accused to insist upon a privilege which Congress has given him. In the *Kotteakos* case, *supra*, this Court again emphatically asserted that such an error as complained of here did not come within the purview of Sec. 269 and used this language:

> "If when all is said and done, the conviction is sure that the error did not influence the jury, or had but

very slight effect, the verdict and judgment should stand, *except perhaps when the departure is from a constitutional norm,* OR A SPECIFIC COMMAND OF CONGRESS." (*Citing the Bruno* case, *supra.*)

Perhaps, in an excess of zeal, concerning this legal proposition, we have unduly confused the issue both in the petition to this Court and in the Circuit Court by citing the authorities relating to the correction of mere technical errors—those authorities being to the effect that the correction to be effective must be prompt. We are now convinced that because of such extensive citation of authorities (intended as additional ground) on that proposition the Circuit Court, and this Court, has lost sight of the basic concept that to deprive an accused of a privilege which Congress has given him is *juris et de jure* reversible error.

Certainly, the Circuit Court did not decide the question squarely posited there. That court rested its finding on the alternative proposition raised and found that: "The law is settled that cases are not reversed unless it appears that the error complained of has reasonably prevented substantial justice being done." The Respondent in the opposition brief filed in this Court, was equally disinclined to discuss the real question raised under this heading as Respondent merely quoted excerpts from the finding of the Circuit Court and studiously avoided any mention of the real objection raised. We say that when an accused is deprived of a right granted him by Congress the "substantial justice doctrine" of ignoring error becomes irrelevant. This Court has said that the deprivation of such right is irreparable.

We think that this question is as important in the administration of federal criminal law as was the question in the *Bruno* case, *supra,* and that we should have an opportunity to appear before this Court and argue it.

The doctrine in the *Bruno* and *Kotteakos* cases has been strangely modified and undermined by the finding of the Circuit Court and the Respondent's brief which avoids all reference to the effect of the type of error here complained of. A respect for the fair administration of justice by the profession requires a fair statement of an important point to be openly stated, argued and decided. Such is not the case here. This point was not discussed in either the Circuit Court's opinion or in the reply brief of the Respondent. This Court is entitled to have the Respondent reply to a point of law so clearly and squarely spread on the record.

The parallel between the facts in this case and those in the *Bruno* case is striking. In this case, as in the *Bruno* case, a request to charge was made and refused. In both cases exception was reserved to the refusal to so charge. In this case, the Court decided to tell the jury that "they were not to consider the defendant's failure to testify in their discussions and deliberations" only after that had already been free to so argue to each other for about six hours. It is sought to predicate waiver of the original exception on petitioner's failure to object to this belated giving of the charge. This seems to be pure sophistry. The objection was not to the giving of the belated charge—for what it was worth. The objection was to the refusal to give the charge that this Court, in the *Bruno* case, stated this accused was entitled to have by specific command of Congress. Congress could not have meant that an accused could be refused the right, and the jury allowed to deliberate for six hours and then belatedly given it. He was entitled to the right at the instant that he requested it. If he did not get it then he was deprived of a right given him by a specific command of Congress.

Nor do we think it a sufficient answer to speculate as the Circuit Court has done (the argument being adopted by

Respondent) that the belated giving of the charge might have been of more benefit to the defendants than if given as part of the general charge. If Congress has ordained that an accused was entitled to the charge upon request, and the request was denied, we again come back to the principles of the *Bruno* and *Kotteakos* cases, *supra*, that the accused cannot be deprived of a right granted him by a specific command of Congress. The deprivation of such right cannot properly be rationalized by mere speculation for Congress has not left it to the courts to do so. The policy has been established by Congress. Its mandate is to be followed, and excuses from a deviation therefrom should not be sought for in speculation.

We shall not labor the point further. We think the issue is now unequivocally set forth, and will not be confounded with the authorities relating to correction of error as to matters not at all applicable to "when the departure is from a constitutional norm, or a specific command of Congress."

II

Relative to the erroneous instructions by the Trial Court of law relating to presumption of innocence, and reasonable doubt.

Respondent did not seriously endeavor to uphold the various basic errors committed by the Trial Court in instructions relating to the rule of presumption of innocence.

Respondent could hardly have successfully defended such statements as: that the presumption does not apply to person in fact guilty; that the *prima facie* evidence of the truth of the charges in the indictment is presented to the jury. See *Coffin* v. *U. S.*, 156 U. S. 432, 458-462; *Gomila* v. *U. S.*, (5 Cir.) 146 F. (2d) 372; *Ezzard* v. *U. S.*, (8 Cir.) 7 F. (2d) 808, 811; *McAdams* v. *U. S.*, (8 Cir.) 74 F. (2d) 37, 40.

The statement in the charge that "Reasonable doubt is a doubt for which a reason may be given," although many times held to be erroneous (see authorities cited in footnote 32, p. 31 Silverman pet.) was not discussed at all by Respondent, although a conflict exists in the federal circuit courts concerning whether such charge is so prejudicial as to constitute reversible error.

Concededly, no particularizing objection was made to these errors, and the law is that this Court may disregard them. On the other hand, the errors are so serious, so fundamental and so numerous that a conviction in such a case should not be permitted to stand on a mere technicality. That this Court may consider such errors is likewise well settled (see *Brasfield* v. *U. S.*, 272 U. S. 448, 450; *U. S.* v. *Atkinson,* 297 U. S. 157, 160; *Gomila* v. *U. S.,* (5 Cir.) 146 F. (2d) 372. Nor is the Respondent correct in stating that these errors should not be noticed because the proof of guilt is overwhelming. That the evidence presents facts that would produce strong emotional reaction and prejudice against the defendants tried is undenied, but that all of the evidence should be imputed to the petitioner is open to serious question and even the Circuit Court segregated as to whether he was part of a general conspiracy, and we submit that on that essential element of the offense, there was grave doubt both as to the law and the facts. This, we think, is the kind of case where the Court should exercise its discretion in noticing plain error which appears on the face of the record.

III

Relative to the finding that petitioner was a member of the general conspiracy as laid in the indictment.

This proposition was argued at length in the original petition (page 8, et seq.) and it was shown that in the great majority of transactions imputed to petitioner he had no

part in or knowledge of (see Chart Ap. pet. p. 47, et seq.). Nevertheless, Respondent ignored the fact that the Circuit Court specially segregated petitioner, but on the contrary, argued that the Circuit Court found that (Respondent Br. p. 35):

> "• • • • the record leaves in no doubt that they formed one wolf pack. It shows a concerted, plotting, scheming, and conniving in loading and reloading their victims, a concerted scurring hither and thither to find, a concerted stealthy stalking of their prey. It shows, too, a perfect timing in crowding their victims and in the final moving in for the kill. This could not have been possible had there been no general understanding, no underlying plan."

We have quoted the Respondent's excerpt from the Circuit Court's finding in order to emphasize that it was not the finding of the Circuit Court as to this petitioner, Silverman.

For emphasis, and so that there can be no misconception as to the legal situation *quo ad* petitioner, Silverman, we requote the finding with the part omitted in Respondent's brief.

> "As to all the defendants *but Silverman* the record leaves in no doubt that they formed one wolf pack. It shows a concerted plotting, scheming, and conniving in loading and reloading their victims, a concerted scurrying hither and thither to find, a concerted stealthy stalking of their prey. It shows, too, a perfect timing in crowding their victims and in the final moving in for the kill. This could not have been possible had there been no general understanding, no underlying plan."

The court then states that,

> "If we are mistaken in this [including petitioner in a general conspiracy] and there were two conspiracies, one between Baker and the other defendants and another between Silverman [petitioner], Baker and some of them, it is perfectly clear that the conspiracy

> in which Silverman was engaged, if it was a separate conspiracy, was so closely connected with the main, the general conspiracy, as that the variance could not affect and has not affected, his substantial rights, and the principles laid down in Kopald-Quinn Co. *v.* U. S., 101 F. (2d) 633, and Berger *v.* U. S., 295 U. S. 78, controls."

We submit that the Chart (Pet. Br. Ap. 47 et seq.) showing that out of 25 investor witnesses, 16 did not involve him at all, shows, without more, the fallacy of the aforesaid quotation. The principles of the *Berger* case, *supra,* could not possibly be applied to a case of this kind. The *Berger* case involved a few simple transactions among a few persons concerning the same counterfeit money, and could not, by any stretch of the imagination, be made analogous to this case where petitioner merely purchased land from the co-defendant, Baker, and sold it on his own account. He could not know what transactions others may have had with the same land or the same vendor.

We reiterate, the indictment itself shows that petitioner dealt at arms length with Baker the owner of the Plaquemines Land Co. Petitioner purchased land from him at a set price and was required to pay cash in advance. This is shown conclusively by reference to the indictment letters in Count I (R. 19) where the mail fraud count letters show that the deed to certain property purchased by petitioner was sent to a bank with instructions to deliver the deed to petitioner only upon his paying the sum of $112.50, plus bank's handling charges. The bank was instructed to remit this cash to the Plaquemines Land Co. This does not coincide with Respondent's broad assertion of a conspiracy to divide profits, etc. It shows a relationship of merely a buyer and seller of land dealing at arms length, nothing more.

It is the kind of case such as *Marcante* v. *U. S.*, (10 Cir.) 49 F. (2d) 156, 157, in which the Court stated of the government's evidence: "It forged the links but failed to join them in a chain."

Wherefore, petitioner, Nathan Silverman, through his counsel, respectfully prays for a rehearing, and for certiorari, as originally prayed for.

Respectfully submitted,

WARREN O. COLEMAN,
Counsel for Petitioner,
408 Whitney Building,
New Orleans 12, Louisiana.